

DOCUMENT RESUME

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[Protest to Two-Step Procurement]. B-189014. September 21, 1977.
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Decision re: Bencor Corp. of America, by Robert F. Keller,
Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel; Procurement Law I.

Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).

Organization Concerned: Department of the Army: Corps of
Engineers.

Authority: A.S.P.R. 2-501-503. B-173663 (1972).

A protester charged that there were violations of regulations dealing with formally advertised two-step procurements which do not permit two second-step procurements after only one first step or the addition of work not contained in the scope of work in the solicitation as a first step. The use of two invitations for bids (IFB) where neither acceptable offeror could obtain adequate bonds was not objectionable. The second-step IFB, which contained a greater quantity of construction than was included in the scope of work under the first step because of unknown factors, was not objectionable and did not alter technical specifications. (HTW)

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DECISION



*J. V. Miller
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**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20543**

FILE: B-189014

DATE: September 21, 1977

MATTER OF: Bencor Corporation of America

DIGEST:

1. Use of two IFB's as second step of two-step formally advertised procurement where, due to size of project, neither acceptable offeror could obtain adequate bonds is not objectionable. Fact that second phase of second-step procurement was limited only to successful offerors under first step did not restrict any other firm's ability to compete as first step was open to competition from industry.
2. Second-step IFB, under two-step formally advertised procurement, which contained greater quantity of construction than was included in scope of work under first step because final size of project was not known at time first step was issued due to continuing exploratory drilling, is not objectionable. IFB did not alter technical specifications contained in first step and successful offerors' proposals but merely added additional quantity of wall to be constructed. Additional quantity would not have affected technical acceptability of rejected first-step proposals.

Bencor Corporation of America (Bencor) has protested the award of a contract to ICOS Corporation of America (ICOS) under invitation for bids (IFB) No. DACW62-77-B-0074, issued by the Department of the Army, Corps of Engineers.

A statement of the history of the procurement is necessary for an understanding of the protest. In 1967, seepage problems were discovered in the limestone foundation for the earth embankment of Wolf Creek Dam, Russell County, Kentucky. From 1968 to 1970, the Corps of Engineers undertook exploration and remedial grouting to determine the extent of the seepage and what measures were necessary to correct the problem and insure the integrity of

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the dam. In January 1972, the Corps submitted the results of its 2-year exploration to a board of consultants composed of engineers and geologists for review. The consultants concluded, in August 1972, that serious defects existed in the foundation and that remedial grouting would not result in a safe solution to the problem. The construction of a positive cutoff in the form of a concrete diaphragm wall was recommended by the board as the most practicable solution.

Based on the consultants' report and a further report from the Corps itself, the Director of Civil Works in the Office of the Chief of Engineers, in January 1973, authorized the construction of the wall and approved the use of two-step formal advertising procedures as the contracting method. The Corps chose this method of contracting because there were not sufficiently definite or adequate specifications for the project and the two-step method permitted technical discussions with offerors under the first step to assure an acceptable technical approach and an understanding of the work.

On May 21, 1974, the Corps issued request for technical proposals (RFTP) No. DACW62-74-R-0104 as step one of the two-step procedure. The RFTP requested proposals for the construction of a diaphragm wall from station 35+11L to station 55+00L. Seven proposals were received on August 15, 1974, in response to the RFTP. The proposals of ICOS and ECI-Soletanche, Inc. (ECI), were found to be technically acceptable. Bencor's proposal was found to be unacceptable and it was notified of this finding in January 1975.

During the time the proposals were being evaluated, and until March 1975, the Corps continued exploratory drilling along the length of the Wolf Creek Dam to determine how far the diaphragm wall would have to extend. Based on the results of this exploration, it was found necessary to extend the length of the diaphragm wall from station 35+11L to station 55+00L to station 35+11L to station 55+50L. It was also concluded that the switchyard was in need of further protection and a 580-foot section of wall had to be constructed there.

However, both acceptable offerors, ICOS and ECI, advised the Corps of the difficulty in obtaining the necessary bonds for the entire project and, therefore, the Corps determined to only advertise for the construction of the wall from station 35+11L to station 45+00L and the switchyard area. On May 2, 1975, invitation for bids (IFB) No. DACW62-75-B-0036 for the above requirement was issued to ICOS and ECI.

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ICOS submitted the low bid of \$49,959,900 and on June 27, 1975, was awarded the contract. B.I.'s bid was \$69,940,500 but it failed to submit the required bid bond.

In April 1977, the Corps issued another IFB, No. D/CW62-77-B-0074, for the construction of the remaining portion of the wall. The exploratory drilling had now been completed and it was found that the wall would have to extend to station 57+50L rather than 55+00L as contemplated when the RFTP was issued. Therefore, IFB -0074 was for constructing the wall from station 45+00L to station 57+50L.

Bencor requested an opportunity to participate in this IFB but was advised by the contracting officer that the IFB for the second phase of construction was restricted to ICOS and ECI because of their acceptable technical proposals under the RFTP. Upon receipt of this advice, Bencor protested the procurement to our Office.

Bencor's protest is based on the premise that the Corps' procurement of the concrete diaphragm wall violated the pertinent provisions of the Armed Services Procurement Regulation (ASPR) dealing with two-step formally advertised procurements. Bencor argues that ASPR §§ 2-501 to 2-503 (1976 ed.), containing the procedures for two-step procurements, do not permit two second-step procurements after only one first step nor the addition of additional work not contained in the scope of work in the RFTP as first step. Bencor states that through the addition of the switchyard area and extending the wall through station 57+50L, the Corps increased the scope of work 41 percent because the RFTP contemplated a wall 2,000 feet long and the above change added an additional 830 feet to the project.

The Corps, in response to the protest, contends that the additional work was contemplated in the RFTP and only constituted an additional quantity and not a change in the method of construction proposed by the offerors under the RFTP. The RFTP in paragraph 6 stated:

"6. THE CONSTRUCTION PERIOD will be a maximum of 730 calendar days for the installation of the diaphragm wall between station 35+11L and station 45+00L after receipt of notice to proceed. An additional maximum of 730 calendar days will be allowed for the installation of the wall between station 45+00L and station 55+00L if included in Step Two."

The Corps contends this paragraph shows that until the exploratory drilling was completed it was not known how long the diaphragm wall would have to extend.

Also, the Corps states that it would have taken an additional 8 to 10 months to evaluate the proposals submitted under another step-one RFTP and that time is a critical factor in the completion of the project because of the possibility of a failure of the embankment with resulting loss of life and property downstream.

From our review of the entire record before our Office, we cannot, for the reasons that follow, conclude that the Corps acted improperly in its handling of this procurement.

The Corps' use of the two-step formally advertised procedure to maximize competition was proper under the circumstances of the instant case. Those firms in this segment of the construction industry who wished to compete submitted proposals, two of which were found acceptable.

While the Corps did add various quantities to the scope of work in the two second steps, we do not find that this worked to any of the five unacceptable offerors' competitive disadvantage. We have reviewed the technical evaluations of the proposals and we find that the quantity of work was not a factor in the rejection of any offeror's proposal. All of the rejected proposals were found unacceptable due to the proposed methodology of construction. Therefore, even if the final length of the wall had been known at the time the RFTP was issued, it would not have affected the evaluation of the proposals.

As to the division of the second step into two phases in order that the bidders could meet the bonding requirements, while being an unusual procedure, we find nothing illegal in the approach. Bencor argues that the Government cannot conduct a second step IFB without a corresponding first step. While this is the procedure set forth by ASPR, we do not believe the regulations contemplated a situation, such as here, where due to the size of the project bonding difficulties are experienced. Through the conduct of the first step, the Corps complied with the intent and spirit of the ASPR provisions and all parties competed on an equal basis.

Bencor has cited our decision B-173665, April 4, 1972, for the proposition that where an original step-one solicitation is so substantially amended as to constitute a new procurement, all interested parties should be given notice and an opportunity to compete, not just those who submitted acceptable proposals under the first step. We assume Bencor is referring to our reconsideration of the above decision dated July 13, 1972, which contained the above statement. We do not find that decision applicable to the instant facts. The cited decisions involved a negotiated procurement, not a two-step. There the change affected the competition, in this case, we have concluded it did not.

Bencor also contends that the Corps' argument that an additional 8-10 months would be needed to conduct another RFTP and that urgency is needed due to the condition of the embankment is inconsistent with the determination to employ two-step formal advertising. Bencor cites ASPR § 2-502(a)(iv) (1976 ed.) which states two-step formal advertising will be used when sufficient time is available rather than negotiation. Therefore, Bencor argues, by deciding that two-step was a feasible procurement approach, the Corps necessarily determined there was sufficient time available. However, we believe this rationale must be tempered by the fact that the decision to use two-step formal advertising was made over 4 years prior to the issuance of the IFB now under protest and when the determination was made, it was not known that the bonding difficulties would be experienced necessitating a two-phase, second step.

Finally, Bencor contends that if we permit the procedure followed by the Corps, it will have far-reaching implications in Government procurement. Bencor foresees that a contracting officer could draft an RFTP for such a large project that only a small number of firms are in a position to compete and then reduce the size of the project by proceeding in small phases, limited to those successful firms under step one. We do not see this as a logical extension of this decision. The procedure of a two-phase, second step utilized here was necessitated by the size of the bonds required and the fact that the additional quantities were added because of the continuing exploratory drilling to determine the extent of the damage to the dam.

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In light of all the unusual circumstances, we cannot conclude that the original purpose of the project was so changed here as to require a conclusion that an entirely new step-one solicitation needed to be issued. However, since we perceive few instances where two phases of a second step would be required to fulfill an agency's initial needs, procuring activities should carefully weigh their employment of such a procurement method.

Accordingly, the protest is denied.


Acting Comptroller General
of the United States